IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TRUSTEES OF BOSTON UNIVERSITY, LEON C. HIRSCH, TURI JOSEFSEN GERALD CASSIDY, and LORETTA P. CASSIDY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-1312-SLR
LIGAND PHARMACEUTICALS, INC.	)	
Defendant.	)	

William O. LaMotte and Patricia R. Uhlenbrock, Morris Nichols Arsht & Tunnell, Wilmington, Delaware. Counsel for Plaintiffs.

Donald J. Wolfe, Jr. and Arthur L. Dent, Potter Anderson & Corroon LLP, Wilmington, Delaware. Counsel for Defendant.

MEMORANDUM OPINION

Dated: April 11, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On December 11, 2001, Trustees of Boston University, Leon C. Hirsch, Turi Josefsen, Gerald Cassidy and Loretta Cassidy (hereinafter "plaintiffs") filed a complaint against Ligand Pharmaceuticals, Inc. ("Ligand") in the United States District Court for the District of Massachusetts. (D.I. 1) The complaint included three counts. (Id.) The first count was for breach of contract, the second for breach of implied covenant of good faith and fair dealing, and the third was for unfair and deceptive trade practices under Mass. Gen. L. ch. 93A, § 11 ("93A"). (Id.) On motion of defendant and with the agreement of plaintiffs, the case was transferred to this court pursuant to 28 U.S.C. § 1404(a).

Currently before the court is defendant's motion to dismiss count three of the complaint. (D.I. 6) Since the parties submitted documents in support of and opposition to the motion to dismiss, the court will review the motion as one for summary judgment. For the reasons discussed below, defendant's motion is granted.

II. BACKGROUND

Plaintiffs were major shareholders of Seragen, Inc. (Seragen") prior to its merger on August 12, 1998 with Knight Acquisition Corporation ("Knight"), a wholly owned subsidiary of

defendant Ligand. (D.I. 7 at 2) Part of the merger agreement among Ligand, Knight and Seragen included payment to plaintiffs on obligations owed them by Seragen. (Id.) The second of these payments ("Milestone Consideration") was to be paid by a certain date if and when the Food and Drug Administration approved the primary drug developed by Seragen. (Id. at 2-3) The merger agreement called for Ligand to make a $37 million payment as the Milestone Consideration and provided that Ligand could off-set any "Parent Damages" as defined in the merger agreement against the Milestone Consideration. (Id. at 3) Shortly after the merger was completed, the common shareholders of Seragen sued Ligand, Knight, Seragen, Seragen Technology, Inc., and most of the plaintiffs in this suit in the Court of Chancery of the State of Delaware for various alleged breaches of fiduciary duty stemming from their affiliation with Seragen.[1] (Id.) That case is still pending. (Id.) Subsequent to the filing of that suit, Ligand exercised its off-set right pursuant to the terms of the merger agreement and notified plaintiffs that it was withholding approximately $2.1 million as off-set from the Milestone Consideration from plaintiffs. (D.I. 1 at 3) Thereafter, plaintiffs filed their complaint in Massachusetts. (D.I. 1)

[1] Oliver et al. v. Boston University et al., CA No. 16570-NC. Plaintiff Loretta Cassidy was not named as defendant in that suit.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden to demonstrate that no genuine issue as to any material fact is present. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

However, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat

a properly supported motion for summary judgment; the function of this motion is to weigh the evidence and determine if a genuine issue is present for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

Defendant contends that the merger agreement contains a choice of law clause stating that the governing law shall be that of the State of Delaware. (D.I. 7 at 4) Thus, plaintiffs are barred from bringing any claims arising under Massachusetts law. (Id.) Defendant asserts that because plaintiffs are seeking to enforce one of the terms of the merger agreement, they cannot claim they are not bound by other provisions of the merger agreement, including the choice of law provision. (D.I. 11 at 2) Plaintiffs counter that an alleged breaching party may not enforce the provisions of a contract. (D.I. 10 at 2-3) Plaintiffs also argue that claims not arising under the merger agreement, such as a 93A claim, are not governed by the choice of law provision of the merger agreement. (Id. at 4-5)

A. Whether breaching party may enforce other provisions of agreement.

Plaintiffs argue that defendant cannot breach the agreement and also enforce other provisions of the agreement. (Id. at 1) The cases plaintiffs cite to support this proposition are inapposite. Ranger Nationwide, Inc. v. National Indemnity Co., 658 F. Supp. 103, (D. Del. 1987) and Schutzman v. Gill, 154 A.2d 226, (Del. Ch. 1959) both involved attempts by the defendants to avoid plaintiff's claims by asserting that plaintiff breached the contract first and, therefore, could not claim breach by the defendants. In both cases, the court found that the plaintiff had not breached the contract and defendants could not avoid fulfilling their obligations under the contract with the asserted argument. Ranger Nationwide, Inc., 658 F. Supp at 108; Schutzman, 154 A.2d at 230.

The facts in the case at bar are distinguishable from the facts in Ranger Nationwide and Schutzman. Ligand is not trying to avoid enforcement of any provisions of the merger agreement by claiming that a prior breach by plaintiffs excuses its performance. Ligand claims it properly invoked the off-set provision of the merger agreement. Plaintiffs disagree that the election was proper. This is a straightforward breach of contract suit. Because the cases cited do not support plaintiffs' contention, their argument fails.

B. Governing law provision enforcement.

The merger agreement contains the following choice of law provision in relevant part:

> 8.8 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware regardless of the laws that might otherwise govern under applicable principles of conflicts of law thereof.

(D.I. 7 at 4)

When parties to a contract agree to apply the law of a certain jurisdiction to disputes arising under the contract, courts generally accept the parties' agreement. Weiss v. Northwest Broadcasting, Inc., 140 F. Supp.2d 336, 342 (D. Del. 2001); Kreider v. F. Schumacher & Co., 816 F. Supp 957, 960 (D.Del. 1993). As third-party beneficiaries under the merger agreement, plaintiffs are also bound to the provisions of the merger agreement when they are asserting a claim under the agreement. Process Storage Vessels, Inc. v. Tank Service Inc., 541 F. Supp. 725, 733 (D. Del. 1982); see also Coastal Steel Corporation v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir 1983) (finding error of law where lower court refused to enforce contract clause against a third-party beneficiary, reasoning that is was "inconsistent with the law of contracts, which has long recognized that third-party beneficiary status does not permit the avoidance of contractual provisions otherwise

enforceable"), overruled on other grounds, Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989).

This court concludes that if the third count of the complaint that defendant is seeking to dismiss arises under the merger agreement, plaintiffs are bound by the governing law provision of the agreement.

C. Whether count three of the complaint arises under the merger agreement.

The question remains whether plaintiffs' 93A claim arises under the merger agreement or involves a right of plaintiffs separate from the merger agreement.

Even in the presence of a choice of law provision mandating choice of another state's law for resolution of the contract dispute, courts have allowed claims under 93A to proceed if the complaint alleges facts unrelated to the contract claim that would support the 93A claim. In Jacobson v. Mailboxes Etc. U.S.A., Inc., the 93A claim was allowed to proceed even though the contract stated that California law would apply to all disputes. 646 N.E.2d 741, 746 n.9 (Mass. 1995). In that case, the court found that the complaint alleged wrongful conduct by the defendant **prior** to the formation of the contract. While the court upheld the choice of law provision governing the contract claims, the court held that the non-contract claims were not necessarily subject to the choice of law provision. Id. The court noted that "[a]n action for precontract misrepresentations

and for fraud in the inducement, however, does not easily sound like an action to enforce an agreement." Id. at 745. Likewise, in Stagecoach Transportation, Inc. v. Shuttle, Inc., the court allowed the 93A claim because the alleged facts giving rise to the claim did not arise out of the contract, which contained a New York choice of law provision, but stemmed from deceitful action unrelated to the contract. 741 N.E.2d 862, 868 (Mass. App. Ct. 2001).

The holding in Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604 (2nd Cir. 1996), does not change the analysis. The Second Circuit cited the Jacobson case discussed above in remanding the case at issue for further determination of the 93A claim by the district court. Id. at 612. As noted above, Jacobson allowed claims under 93A when the wrongful acts arose outside the contract. Valley Juice, therefore, does not alter the fact that whether a 93A claim should be allowed to proceed depends solely on whether the acts alleged to violate 93A arise from within or outside the contract.

The court finds that count three of the complaint merely alleges that Ligand knowingly and willfully breached the merger agreement. (D.I. 1 at ¶ 36) Other courts have held that adding the allegation that defendant acted willfully or knowingly does not transform a simple breach of contract claim into a 93A claim. In Northeast Data Systems, Inc. v. McDonnell Douglas Computer

Systems Co., 986 F.2d 607 (1st Cir. 1993), the court rejected plaintiff's argument that claiming that the defendant acted "'willfully' or 'knowingly' or with bad motive add[ed] something to the pure breach of contract claims." Id. at 609. The court held that to conclude that allegations that a breach of contract claim was "knowing or willful" could support a separate 93A claim would "permit[] one of them, through artful pleading, to bring what is little more than a breach of contract claim, under law that both parties have agreed would not apply." Id. at 610. Other courts have come to this same conclusion. See Scheck v. Burger King Corp., 756 F. Supp. 543, 545-46 (S.D. Fla. 1991), (dismissing the 93A claims where the facts alleged were limited to the contract claims); and ePresence, Inc. v. Evolve Software, Inc., 190 F. Supp.2d 159 (D. Mass. 2002) (dismissing 93A claim based on choice of law provision calling for California law to govern any dispute).

The court finds this reasoning persuasive. Therefore, the court holds that plaintiffs' allegations of willful and knowing conduct by defendant do not refer to any acts beyond a breach of contract claim that would support a claim under 93A.

V. CONCLUSION

For the reasons stated, defendant's motion to dismiss count three of the complaint for unfair and deceptive trade practices

under Mass. Gen. L. ch. 93A § 11 is granted. An appropriate order shall issue.

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TRUSTEES OF BOSTON UNIVERSITY, LEON C. HIRSCH, TURI JOSEFSEN GERALD CASSIDY, and LORETTA P. CASSIDY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-1312-SLR
LIGAND PHARMACEUTICALS, INC.	)	
Defendant.	)	

O R D E R

At Wilmington this 11th day of April, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that defendant's motion to dismiss count three of the complaint (D.I. 6) is granted.

Sue L. Robinson
United States District Judge